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FOR ARGUMENT

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

RICHARD LYLE AUSTIN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF AMICI CURIAE STATES OF ARIZONA AND CALIFORNIA, IN SUPPORT OF RESPONDENT

Joined by the States of Arkansas, Connecticut, Florida, Georgia, Hawaii, Idaho, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Texas, Utah, Virginia, Washington, Wyoming, and Territory of Virgin Islands.

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QUESTIONS PRESENTED

I. Whether the concept of proportionality arising from the eighth amendment to the United States Constitution should be applied to the forfeiture of property under 21 U.S.C. § 881(a)(4) and (a)(7)?

II. Whether, when a showing is made that the forfeiture is excessive, the government must show that the forfeiture is not so grossly disproportionate to the offense as to violate the cruel and unusual punishments and excessive fines clauses of the eighth amendment?

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INTEREST OF AMICI CURIAE

Virtually every state legislature has enacted civil in rem forfeiture statutes that provide for the forfeiture of the instrumentalities of drug offenses. This remedial tool is used as an effective economic measure to protect the public from the consequences of illicit drug activity which is the subject of the federal statute at issue in this case.

Costs arising from drug use are enormous and fall most heavily on the States. Direct medical costs are substantial. The costs of treating children born to mothers who used cocaine while pregnant is one illustration. A 12 city survey found that 72 public and private hospitals are caring for more than 7,000 "boarder babies" a year at an annual cost of $34 million.[1/]

The accelerant effect of drug use on the AIDS epidemic is another illustration. In New York City officials estimate that at least half of the intravenous drug users are HIV positive, and that 61 percent of the city's female AIDS cases and 37 percent of the male cases stem from using infected needles. The lifetime cost of treating an AIDS patient in the United States is now $102,000.[2/]

Prevention of drug abuse through education, family counseling, early family intervention and follow-up of identified drug abuse risks through diversion, enforcement, probation and parole are consuming ever larger sums of public funding at state and local levels. In the period from fiscal year 1982 through 1992, the annual federal drug control budget soared from $1.605 billion dollars to $11.655 billion dollars, more than a seven-fold increase.[3/]

Direct social expenditures on drug users is only a small part of the overall cost of drug abuse. Vast public and private

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1. New York Times, July 26, 1992 at A16. Another $150 million per year is spend on special education for the "survivors."

2. New York Times, July 23, 1992, at B8.

3. U.S. Department of Justice, Sourcebook of Criminal Justice Statistics, 1990 at 626-628 [hereafter cites as Sourcebook].

losses are masked, including reduced productivity, inflated health care and health care insurance costs, work-related and non-work-related accidents, including automobile accidents, and artificial inflation and distortion in markets affected by drug money laundering activity.

The profits reaped from the distribution of illicit drugs have more insidious social costs. Illegally derived money distorts the legitimate economy. According to the Treasury Department's Financial Crimes Enforcement Network ("FinCEN"), the fishing industry in Washington state[4] and the diamond district in New York[5] are at risk from money laundering. The same is reportedly true for the wholesale jewelry industry in Los Angeles.[6] Dirty money assertedly played a role in the savings and loan crisis as well.[7]

The illicit drug industry has emerged in the waning years of the twentieth century as one of most significant economic threats to democratic society world wide. International accords are now required to address the threat, and nations, including the United States, have pressed military forces into drug interdiction. These costs are created in the pursuit of illicit profit, and therefore call for economic remedies.

Drug profits being what they are, for every low-level dealer arrested and imprisoned, there are many eager to take his place. Between 1981 and 1989, prison commitments for drug offenses increased 600 percent.[8] Drug-related arrests in

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4. FinCEN, Money Laundering Threat Assessment for Washington State, at 80-81.

5. FinCEN, Money Laundering Threat Assessment for New York City Metropolitan Area, at 12.

6. Los Angeles Times, August 22, 1991, at B1.

7. Wall Street Journal, April 18, 1991, at B6(E).

8. See, Civil Remedies In Drug Enforcement Report (August/September 1991) at 14, citing Studies by the Bureau of Justice Statistics, U.S. Department of Justice.

cities over 100,000 population rose by an average of 250% between 1980 and 1989 for sales and distribution offenses. By the end of 1991, state prisons were operating at nearly one-third above capacity and federal prisons were 46 percent above capacity.[9]

The U.S. General Accounting Office concluded that drug prosecutions have "greatly increased the burden on already strained courts, correctional facilities, probation and parole offices, and substance abuse centers."[10] The rate of sentenced prisoners in state and federal institutions per 100,000 resident population remained relatively constant in modern U.S. history from 1930 to 1975 at around 100-120. Between 1975 and 1989 it grew rapidly to more than double that, to about 270 per 100,000 resident population in 1989.[11]

These costs are largely borne by state and local government. Civil, in rem forfeiture is a critical economic remedy applied to a profit-motivated drug industry. Amici have a compelling interest in the outcome of this case. Should the Court conclude that the eighth amendment constrains civil instrumentality forfeitures, the implementation of federal and state forfeiture statutes will be seriously impaired. There is little doubt that the eighth amendment prohibitions against either cruel and unusual punishments or excessive fines as construed in this case would apply to the states. Browning-Ferris Industries v. Kelco Disposal, Inc., 492 U.S. 257, 284

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9. See, Civil Remedies In Drug Enforcement Report (August/September 1991) at 14, citing studies by the Bureau of Justice Statistics, U.S. Department of Justice.

10. See, "The War on Drugs: Arrests Burdening Local Criminal Justice Systems" (General Accounting Office, April 1991).

11. Sourcebook, at 603. These figures suggest a far more substantial social cost of drug dealing. The "freedom cost" is a cost suffered by a society in direct proportion to its incarceration rate. It would be a bitter irony if a constitutional provision designed to control this cost were interpreted to disable a non-incarceration strategy, forcing even greater reliance on incarceration and raising the freedom cost of social control.

(1989) (and cases cited therein) (O'Connor, J. concurring and dissenting).

SUMMARY OF ARGUMENT

The eighth amendment prohibition against cruel and unusual punishments does not constrain civil instrumentality forfeiture because such forfeitures are not "punishment" within contemplation of the amendment. "Punishment" has been construed as a punitive, corporal sanction only. See, Harmelin v. Michigan, 111 S.Ct. 2680 (1991). Forfeiture is remedial, not punitive, see United States v. One Assortment of 89 Firearms, 465 U.S. 354 (1984), and affects property, not the person.

A civil instrumentality forfeiture does not constitute a "fine" for purposes of the eighth amendment. Fines evolved from pre-Magna Carta amercements which developed wholly apart from both forfeiture of estate and in rem forfeiture. Browning-Ferris Industries v. Kelco Disposal, Inc., 492 U.S. 257 (1989). There is nothing to suggest that in adopting the eighth amendment the Congress intended it to apply to in rem forfeitures. Fines are punitive sanctions which enrich the government, while forfeitures are remedial and serve to prevent unlawful conduct and compensate for loss suffered by the government.

Civil instrumentality forfeitures are constrained only by the requirement that the forfeiture bear a rational relationship to the purposes of regulating, suppressing and remedying illegal conduct. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974). Forfeitures under section 881 of Title 21 of conveyances and real property used to facilitate narcotics offenses are a reasonable response to the highly capitalized network which brings illegal drugs to the ultimate consumer by removing the network's assets, providing a disincentive to such conduct, imposing an economic sanction, and financing government anti-crime efforts. Proportionality analysis of a

civil instrumentality forfeiture is unnecessary and inappropriate to the remedial purpose of these statutes.

I.
THE EIGHTH AMENDMENT PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENTS IS INAPPLICABLE TO CIVIL INSTRUMENTALITY FORFEITURE

The prohibitions of the eighth amendment are traceable to Magna Carta. Atrocious and barbaric injuries were inflicted on colonial subjects during the English reign. Harmelin v. Michigan, 111 S.Ct. 2680, 2687-8 (1991). The First Congress enacted the eighth amendment to outlaw particular modes of punishment. Harmelin, at 2694.

The prohibition against "cruel and unusual punishments" has been applied only in circumstances where the punishment is directed to the physical body, and not the property, of a person. It has been applied in capital cases, Payne v. Tennessee, 111 S.Ct. 2597 (1991); Enmund v. Florida, 458 U.S. 782 (1982); severity of prison sentences, Harmelin v. Michigan, 111 S.Ct. 2680; Robinson v. California, 370 U.S. 660 (1962); and conditions of confinement, Hudson v. McMillian, 112 S.Ct. 995 (1992); Wilson v. Seiter, 111 S.Ct. 2321 (1991). Historically the prohibition against cruel and unusual punishments has been employed to protect the physical body from abuse. It has not been employed or construed to address property rights.

Instrumentality forfeiture[12] is an ancient practice by which property used to commit or facilitate a crime or violation of a statute may be declared forfeited to the government. The property itself is considered to be the offending thing and the in rem proceeding through which the forfeiture is accomplished

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12. "Instrumentality forfeiture" refers generally to forfeitures caused by the use of an object to commit or facilitate a crime or other conduct giving rise to forfeiture. See, e.g., 21 U.S.C. § 881(a)(4)(7).

stands independent of and wholly unaffected by any criminal proceeding. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 681-686 (1974), The Palmyra, 25 U.S. ___ (12 Wheat.) 1, 14-15 (1827). The rationale sustaining in rem forfeiture is that the thing itself is the offender and the ". . . only adequate means of suppressing the offense or wrong or insuring an indemnity to the injured party . . ." is to forfeit the thing without regard to the owner's conduct. Calero-Toledo, 416 U.S. at 684.

In Calero-Toledo, at 680-683, Justice Brennan, writing for the Court, traced the origins of civil instrumentality forfeiture to the English institution of the deodand, which was itself derived from Biblical, pre-Judeo-Christian, Greek and Roman practices. Citing Oliver Wendell Holmes's The Common Law, 5 (1881), Justice Brennan described how the deodand institution had been adapted to serve more contemporary functions of deterrence and enforcement. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. at 681-682, n. 19.

As this Court more recently observed,

> *Laws providing for the official seizure and forfeiture of tangible property used in criminal activity played an important role in the history of our country. Colonial courts regularly exercised jurisdiction to enforce English and local statutes authorizing the seizure of ships and goods used in violation of customs and revenue laws. . . .*
>
> *The first Congress enacted legislation authorizing the seizure and forfeiture of ships and cargos involved in customs offenses. . . .*
>
> *Later statutes involved the seizure and forfeiture of distilleries and other property used to defraud the United States of tax revenues from the sale of alcoholic beverages. . . .*

> *In all of these early cases the government's right to take possession of property stemmed from the misuse of the property itself.*

United States v. 92 Buena Vista Avenue, Rumson, ___ U.S. ___, 61 U.S.L.W. 4188, 4191 (1993).

Despite the long and storied history of civil instrumentality forfeiture and the modern adaptation of this remedy to ever more complex remedial purposes, the essence of civil instrumentality forfeiture continues to reside in its simple recognition that the use of property is necessary to the continuation of illegal conduct which thereby justifies the forfeiture of the property to the government. See, In re Various Items of Personal Property, 282 U.S. 577, 581 (1931); J.W. Goldsmith, Jr. - Grant Company v. United States, 254 U.S. 505, 513 (1921); United States v. All Funds, et al., 801 F.Supp. 984, 990 (E.D.N.Y. 1992) (currency as the "offending object").

The question presented is whether a remedial, civil forfeiture pursuant to 21 U.S.C. § 881(a)(4)(7), is constrained by the eighth amendment prohibition against cruel and unusual punishments. In determining whether a statutory remedy is constrained by the eighth amendment, it is first necessary to determine if the statute is remedial or punitive. The resolution whether a particular statute is remedial or punitive requires a two-step analysis.[13]

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13. Whether a statute is remedial or punitive has been analyzed under both the double jeopardy provision of the fifth amendment, United States v. Halper, 490 U.S. 435 (1989), and the eighth amendment prohibition against cruel and unusual punishments and excessive fines, United States v. One 107.9 A. Parcel of Land in Warren TP., 898 F.2d 396 (3rd Cir. 1990), United States v. Santoro, 866 F.2d 1538 (4th Cir. 1989). To the extent the analysis whether a statute is remedial or punitive is assisted by evaluating cases under either the fifth or eighth amendments, they are discussed. However the criteria delineating "punishment" under the fifth and eighth amendments are not necessarily interchangeable, as discussed at II, infra.

Our inquiry in this regard has traditionally proceeded on two levels. First, we have set out to determine whether Congress, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other. See One Lot Emerald Cut Stones v. United States, [409 U.S.] at 236-237. Second, where Congress has indicated an intention to establish a civil penalty, we have inquired further whether the statutory scheme was so punitive either in purpose or effect as to negate that intention.

United States v. Ward, 448 U.S. 242, 248 (1980).

Congress intended that 21 U.S.C. § 881(a)(7) be a civil remedy. It appears in Part E, Administrative and Enforcement Provisions of the subchapter, not in Part D, Offenses and Penalties. The civil proceedings of the customs laws for in rem proceedings apply, as well as the use of the rules of civil admiralty. 21 U.S.C. § 881(b), (d) (1988). By creating distinctly civil proceedings for such forfeitures Congress has indicated a civil not criminal sanction. United States v. One 107.9 A. Parcel of Land in Warren TP., 898 F.2d 396. Congressional intent is "clearly demonstrated by the procedural mechanisms it established for enforcing forfeitures under the statute." United States v. One Assortment of 89 Firearms, 465 U.S. 354, 363 (1984).

As to the second step, only the clearest proof will suffice to support a finding a statute is so punitive in purpose and effect so as to negate a civil objective. United States v. One Assortment of 89 Firearms, 465 U.S. at 365; United States v. Ward, 448 U.S. at 249; United States v. One 107.9 A. Parcel of Land in Warren TP., 898 F.2d at 400. Circuit courts applying this analysis to forfeiture have consistently found a remedial purpose and effect. The Fourth Circuit, for example, has found that 21 U.S.C. § 881(a)(7) has broad

remedial purposes which include removing the incentive to engage in the drug trade by denying drug dealers the proceeds of illgotten gains, stripping the drug trade of its instrumentalities and financing government programs designed to eliminate drug trafficking. United States v. Santoro, 866 F.2d at 1544. Acknowledging that any forfeiture has a deterrent effect, the circuit court held that the effects of 21 U.S.C. § 881(a)(7) were civil and not sufficiently punitive to override the clear congressional intent that it be a civil provision.[14]

As explained by the Fourth Circuit, the removal of an instrument of the offense is not primarily an act of punishment, but rather an act which protects the community from the threat of continued drug dealing. United States v. Cullen, 979 F.2d 992, 995 (4th Cir. 1992). Because the chief purpose of instrumentality forfeiture is to remove the public danger posed by the instrumentality in the hands of the offender, considerations relating to punishment are irrelevant.

"In [instrumentality] forfeitures, there is no necessary relation between the value of the property forfeited and the loss to the government, nor is there any necessary proportion between the value of the property forfeited and the criminal use of the property." United States v. McCaslin, 959 F.2d 786, 788 (9th Cir.), cert. denied, 113 S.Ct. 382 (1992).

This Court has explained the factors to be considered in determining whether an action is punitive. Justice Kennedy, in

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14. The Fourth Circuit acknowledged that any deterrent and therefore punitive effect was clearly ancillary to the provisions's remedial, non-punitive purposes. United States v. Santoro, 866 F.2d at 1543, n. 3. Indeed, this Court has recognized that a purely civil forfeiture provision will have certain deterrent effects. Calero-Toledo v. Pearson Yacht Leasing, 416 U.S. at 686.

This Court has also counseled that such determination is not to be made from the defendant's perspective because even remedial sanctions can carry the sting of punishment. United States v. Halper, 490 U.S. at 447, n. 7. Forfeiture actions may have the collateral effect of deterrence but "[t]his fact alone will not render a particular forfeiture punitive in nature." United States v. Certain Real Property . . . 38 Whalers Cove Drive, 954 F.2d 29, 36 (2nd Cir. 1992) (hereafter cited as United States v. 38 Whalers Cove Drive).

his concurring opinion in Harmelin v. Michigan, 111 S.Ct. at 2704, listed the goals of punishment to be retribution, deterrence, incapacitation and rehabilitation. These goals are the points of contrast between criminal and civil actions, as measured by the factors which were recently referred to by Justice O'Conner in the context of a civil action, as being useful in determining whether a sanction is penal:

> *(1) whether it involves an affirmative disability; (2) whether it has historically been regarded as punishment; (3) whether it comes into play on a finding of scienter; (4) whether its operation will promote retribution and deterrence; (5) whether the behavior to which it applies is already a crime; (6) whether there is an alternative purpose for it; and (7) whether it is excessive in relation to the alternative purpose assigned.*

Browning-Ferris Industries v. Kelco Disposal, Inc., 492 U.S. at 298, citing to Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963).

Addressing each factor in turn, forfeiture does not involve the affirmative restraint of the person, such as loss of citizenship, imprisonment or death.

Second, civil forfeiture has not historically been regarded as punishment. As early as 1827, the Supreme Court found that forfeiture occurs independent of any criminal action. The Palmyra, 25 U.S. (12 Wheat.) at 15. More recently, the Court has held that neither double jeopardy nor collateral estoppel precludes civil, in rem forfeiture after an individual has been acquitted in a criminal case. United States v. One Assortment of 89 Firearms, 465 U.S. 354. An individual's innocence does not prohibit forfeiture of his property. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. at 686. Additional protections required in criminal cases have not been imposed in civil forfeiture cases.

In 1796, in United States v. LaVengeance, 3 U.S. (3 Dallas) 297 (1796), the Court held that a jury was not required in in rem actions. See, also, Van Oster v. Kansas, 272 U.S. 465 (1926) (jury not required in state forfeiture action); United States v. Zucker, 161 U.S. 475 (1896) (deposition of witnesses who were not present at trial should have been admitted despite objection); Clifton v. United States, 45 U.S. 242 (1846) (government may comment on forfeiture claimant's failure to produce evidence and on failure to explain circumstances).

Third, there is no requirement of scienter to impose forfeiture. Innocence of the owner has never been a defense to civil forfeiture because the action is against the offending property. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. at 686. It is the use of the property which prompts the forfeiture, not the actions of the owner or interest holder. A person need not be criminally liable as a condition to the civil forfeiture of his property. United States v. McCaslin, 959 F.2d 786; United States v. 141st Street Corp., 911 F.2d 870 (2nd Cir. 1990). The fact that the statute "makes no attempt to tailor the amount of loss suffered by forfeiting to the degree of culpability, [is] a strong indication that any punitive effect is incidental." United States v. $2,500 in U.S. Currency, 689 F.2d 10, 14 (2nd. Cir. 1982).

Fourth, civil asset forfeiture is not designed to serve as retribution or deterrence. The courts have recognized that protection from the harm of an instrumentality in the hands of the wrongdoer is not the only remedial purpose of forfeiture. The forfeiture law also serves other remedial purposes such as enforcing a duty of care that property not be used in the drug trade and financing the government's law enforcement effort.

Congress enacted 21 U.S.C. § 881(a)(7) to attack drug trafficking by removing real property assets which facilitate the drug activity. United States v. 141st Street Corp., 911 F.2d at 880. The economic power of the drug industry is negated when its resources and instrumentalities are forfeited. United States v. 38 Whalers Cove Drive, 954 F.2d at 36.

Forfeiture is additionally justified as a way of compensating the government for damages caused by drug offenses. State and local governments shoulder the bulk of not only the law enforcement costs, but also the costs of treating, educating and rehabilitating the casualties and potential victims of the illicit drug industry. This Court in Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 629 (1989), recognized that there is a strong governmental interest in obtaining full recovery of all forfeitable assets because such funds support law enforcement efforts.

It is impossible to determine with any certainty how much the government will spend on treating crack babies, drug addicts or medical injuries caused by the use of drugs, or how much the economy suffers as a result of drug activity in terms of lost work productivity, market errors and anomalies based on falsely reported land and stock values, unfair competition, and the diversion of legitimate goods and service provided from legitimate commerce to illicit commerce as described in Interest of Amici Curiae, supra. The proceeds of forfeited assets can be applied as compensation for the economic damages suffered by the government. Such recovery is similar to the concept of liquidated damages which has consistently been upheld. In One Lot Emerald Cut Stones and One Ring v. United States, 409 U.S. 232, 237 (1972), this Court upheld the customs forfeiture because it provided a reasonable form of liquidated damages for violation of the inspection provisions and served to reimburse the government for investigative and enforcement costs.

Because a civil penalty is remedial when it reimburses the government for costs, a civil forfeiture is similarly remedial because it acts to reimburse for many of the same costs.[13/] *This*

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15. One useful way of illustrating the compensatory, non-punitive nature of civil in rem forfeiture is to approach the problem through traditional tort analysis.

The four building blocks of a tort remedy are:

1) A duty, meaning an obligation recognized by the law, requiring people to conform to a certain standard of conduct, for the protection of others.

2) A failure to conform to the standard required.

3) A reasonably close causal connection between the conduct and some harm to others, commonly called "proximate cause" or "legal cause."

4) Damages to the interests of another, which includes damages to the public in general.

The analysis will follow Professor Prosser, the noted authority on tort law. Prosser and Wade, Cases and Materials on Torts (fifth ed. 1977).

First, instrumentality forefiture enforces a duty of care that property not be put to an illegal use.

Making use, of standard tort concepts, instrumentality forfeiture could be seen as the tort of "negligent empowerment of unlawful activity," the tort of providing property that somehow helps to empower the damaging conduct.

The causal connection between drug trafficking and the enormous social costs flowing therefrom are well recognized.

Finally, forfeiture imposes a form of strict liability on those who engage in or facilitate a highly dangerous, covert industry and provides a form of liquidated damages when exact damages are difficult to fix.

position was acknowledged by the Second Circuit: "The government may also use forfeitures to compensate the government's investigation and enforcement expenditures, in addition to any damages the government may suffer directly as a result of criminal acts, essentially as a form of 'liquidated damages' for harm caused by an individual wrong-doer." United States v. 38 Whalers Cove Drive, 954 F.2d at 36.

Fifth, while property subject to forfeiture under this statute must be used in a manner that facilitates a violation of law, the owner need not be culpable of criminal activity. The issue in a civil forfeiture proceeding is the use of the property, not the guilt of the person. No stigma attaches to the proceeding; in fact, many claimants are financial institutions and others of unquestioned integrity. The purpose of in rem forfeiture is not to punish the owner, but rather to remove the harm of the instrumentality.

Sixth, the purpose of the forfeiture statutes is not to punish, but to deter further illegal conduct and to remedy the damage done by the illegal conduct. Punishment of an

individual simply has no place in the application of the statute.[16]

The fact that these forfeitures are remedial in nature is illustrated in United States v. $2,500 In U.S. Currency, 689 F.2d 10, 13 (2nd Cir. 1982). In that case, the circuit court examined legislation relating to the forfeiture of drug-related materials, and found that, "[T]he addition of monies to the list of plants, raw materials, vehicles, and records used in drug traffic apparently reflects an indisputable legislative finding that money in the narcotics trade finances and assists future trade at least as much as vehicles and containers and a decision that they should likewise be seized in the effort to impede such traffic."

Finally, forfeiture is not excessive in relation to its goals. Exact damages and individual apportionment thereof is impossible. However, the forfeiture is limited to the instrumentality itself. It comprehends both under-assessments and over-assessments. If a dealer uses his car as an instrumentality to sell a drug which results in injuries the civil sanction of forfeiture falls far short of compensating for the harm proximately caused.

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16. Criminal punishment is based on a model of criminal conduct unrelated to large ongoing financially motivated networks. Infra, part III.

Criminal remedies simply break down when confronted with an ongoing racket, whether it is an international cocaine cartel, an inner-city crack cocaine distribution enterprise, or a small dealer, his sources and customers in South Dakota. First, there are many people whose conduct is part of the continuing operation of the enterprise. Second, the moral content of their conduct is not easily categorized as right or wrong, because participants play many roles which occur in many shades of gray. Third, the importance of their respective contributions to the success of the enterprise varies from essential to expendable. Incarceration tends to fall most heavily on people in roles that are visible but not strategically significant. For example, the drug "mules" who transport narcotics are far more susceptible to detection and arrest than are sophisticated money launderers. Fourth, the economic incentive often overcomes the perceived risk of incarceration. Fifth, punishment of any single participant or even a long succession of low-level participants does not stop or even seriously impair the conduct of the network. Sixth, the victims of criminal profiteering are sometimes not visible or direct, and social costs are spread among many. Many of the victims are participants, but the law-abiding populace pay the social costs.

Instrumentality forfeiture is remedial, so the "punishments" prohibition of the eighth amendment is not implicated.[17]

II. CIVIL INSTRUMENTALITY FORFEITURES ARE NOT FINES UNDER THE EIGHTH AMENDMENT

Whatever else defines a fine, a fine must be a punishment to be implicated in the eighth amendment. The modern day fine has its roots in common law amercements. Solem v. Helm, 463 U.S. 277 (1983). Amercements were the most common criminal sanction in 13th Century England. Id., at 290, n. 8. Amercements emerged after the Norman Conquest in 1066 at a time in English history before there was a distinction between criminal and tort law. Browning-Ferris Industries v. Kelco Disposal, Inc., 492 U.S. at 287. Amercements were punishments meted out by the king. Amercements were originally set by the king and later were assessed by the court. Due to the potential for abuse of amercements, excessive amercements were prohibited by Magna Carta. Solem v. Helm, 463 U.S. at 290.

Fines originated in the 13th Century as a voluntary sum paid to the crown to avoid prison. The fine was a substitute for imprisonment. Browning-Ferris Industries v. Kelco Disposal, Inc., 492 U.S. at 287-288. Fines and amercements

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17. Petitioner has cited United States v. Halper, 490 U.S. 435, in support of the proposition that the eighth amendment is applicable to civil forfeiture. Brief for Petitioner, at 28. Halper did not involve an analysis of punishment for purposes of the eighth amendment but rather of what constitutes punishment for purposes of the double jeopardy clause of the fifth amendment. Halper does not suggest a proportionality test. Halper only prevents a person from being punished twice in violation of double jeopardy. Halper does not limit the civil sanction nor does it provide guidance on the permissible extent of the total sanctions that may be imposed in a single action.

had very similar functions as both were revenue to the crown. Eventually fines were made mandatory, at which point the distinction between fines and amercements disappeared. Ibid.

By the 17th Century fines had lost their original character of bargain and had replaced amercements as the preferred penal sanction. The word "amercement" dropped out of ordinary usage. It was in the 17th Century that the word "fine" took on its modern meaning. Ibid. A fine is a punishment ". . . imposed in a measure out of accord with the penal goals of retribution and deterrence." Harmelin v. Michigan, 111 S.Ct. at 2693, n. 9. Fines were assessed in criminal cases and were a payment to a sovereign as punishment for some offenses. Browning-Ferris Industries v. Kelco Disposal, Inc., 492 U.S. at 267.

Common law recognized two distinct forms of forfeiture during the period in which fines evolved from amercements: forfeiture of estate, assessed after conviction of a felony in personam, and instrumentality forfeiture, resulting from an action in rem. The differences between the two were substantial and significant. Justice Story explained common law forfeiture in The Palmyra, 25 U.S. (12 Wheat.) at 12:

> *It is well known, that at the common law, in many cases of felonies, the party forfeited his goods and chattels to the crown. The forfeiture did not, strictly speaking, attach in rem; but it was a part, or at least a consequence, of the judgment or conviction. It is plain from this statement that no right to the goods and chattels of the felon could be acquired by the crown by the mere commission of the offense; but the right attached only by the conviction of the offender. The necessary result was, that in every case where the crown sought to recover such goods and chattels, it was indispensable to establish its right by producing the record of the judgment of conviction. In the contemplation of the common*

> *law, the offender's right was not devested until the conviction.*

In personam forfeiture was punitive in that the convicted ". . . felon forfeited his chattels to the crown and his lands escheated to his lord; the convicted traitor forfeited all of his property, real and personal, to the crown . . . . The basis for these forfeitures was that a breach of the criminal law was an offense to the king's peace, which was felt to justify denial of the right to own property." Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. at 682.[18]

In personam forfeiture of estate contrasts sharply with in rem forfeiture. As explained by Justice Story:

> *But this doctrine [in personam forfeiture] never was applied to seizures and forfeitures, created by statute, in rem, cognizable on the revenue side of the exchequer. The thing is here primarily considered as the offender, or rather the offense is attached primarily to the thing;*

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18. Common law in personam forfeiture of estate is radically different from modern in personam forfeiture pursuant to 21 U.S.C. § 853 (drug racketeering forfeiture) and 18 U.S.C. § 1963 (RICO forfeiture). Unlike common law forfeiture of estate, where a defendant lost his estate, the defendant in modern in personam forfeitures forfeits only those property interests which are connected to the underlying offense. The racketeering provisions were enacted as a new and different approach to reach the economic base and power of criminal activity. This Court has interpreted the forfeiture provisions liberally to effectuate their remedial purposes. Russello v. United States, 464 U.S. 16 (1983); United States v. Turkette, 452 U.S. 576, 589 (1981).

The statutes themselves provide that the forfeiture provisions shall be liberally construed to effectuate their remedial purposes. 21 U.S.C. § 853(o) (Supp. III 1985), Section 904 of Title IX Pub. L. 91-452, 84 Stat. 922, 947 (1970). The forfeitures pursuant to RICO are part of the criminal sentence but are no more punishment than restitution assessed in a criminal case. The same remedial purposes underlying the civil forfeiture provisions in 21 U.S.C. § 881 are applicable to the criminal forfeiture provisions. Decisions holding that the eighth amendment is applicable to RICO forfeitures, see United States v. Busher, 817 F.2d 1409, 1415 (9th Cir. 1987), have wrongly decided that remedial forfeitures at the conclusion of a criminal case are punishment for eighth amendment purposes.

and this, whether the offense be malum prohibitum, or malum in se. The same principle applies to proceedings in rem, on seizures in the admiralty. Many cases exist where the forfeiture for acts done attaches solely in rem, and there is no accompanying penalty in personam. Many cases exist where there is both a forfeiture in rem and a personal penalty. But in neither class of cases has it ever been decided that the prosecutions were dependent upon each other. But the practice has been, and so this court understand the law to be, that the proceeding in rem stands independent of, and wholly unaffected by any criminal proceeding in personam. This doctrine is deduced from a fair interpretation of the legislative intention apparent upon its enactments. Both in England and America, the jurisdiction over proceedings in rem is usually vested in different courts from those exercising criminal jurisdiction.

The Palmyra, 25 U.S. (12 Wheat.) at 12.

In rem forfeitures have never been equated with amercements, fines or punitive forfeitures. In rem forfeitures were not subject to arbitrary application because only the instrumentality itself was subject to forfeiture. As explained by Justice Story, many cases existed at common law where there was forfeiture in rem based on acts for which there was no accompanying in personam action. This remains the case today. United States v. 141st Street Corp., 911 F.2d 870 (apartment building where drug dealing allowed to occur subject to forfeiture even though the landlord not prosecuted criminally). In rem forfeiture now, as well as historically, has existed to eliminate harmful objects and this is a remedial, not punitive, purpose. The eighth amendment, on the other hand,

was implemented to protect against punitive, not remedial, actions by the government and to protect persons convicted of crimes. Browning-Ferris Industries v. Kelco Disposal, Inc., 492 U.S. at 267.[19]

The eighth amendment prohibition against excessive fines does not apply to compensatory remedies. Compensatory damages are not punitive sanctions and have never been subject to the eighth amendment prohibitions. Browning-Ferris Industries v. Kelco Disposal, Inc., 492 U.S. at 293. Damages comprehend a recompense for losses that have been suffered by means of a wrong done. Id., at 265, n. 6, 7. Amercements and fines were not meant to compensate for damages and were not necessarily related to loss. They were designed to punish the wrongdoer and to express society's displeasure. Id., at 293. A monetary penalty under the eighth amendment is exacted to punish and deter conduct. Id., at 286.

Revenue generated by forfeiture is in the nature of compensatory damages and not a penalty. The government suffers economic loss due to drug trafficking. While certain costs can be calculated, it is impossible to calculate the "seriousness" of a drug sales offense or the "extent of harm caused" by such an offense in purely monetary terms.

That harm consists not only of the illicit profits from the actual drug sale, but the severe

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19. The court has repeatedly interpreted the eighth amendment to apply to punitive, not remedial, sanctions. In Harmelin v. Michigan, 111 S.Ct. at 2693, n. 9, Justice Scalia observed that the eighth amendment applies to punishments, including fines which he described as punishments. The same view is expressed in Browning-Ferris Industries v. Kelco Disposal, Inc., 492 U.S. at 267. The majority noted that the eighth amendment has long been understood to apply primarily, and perhaps exclusively, to criminal prosecutions and punishments. Id., at 262. The eighth amendment has, for example, been held inapplicable to deportation because deportation is not a punishment for a crime. Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893). As Justice O'Connor observed in her dissent in Browning-Ferris, the eighth amendment applies to punitive sanctions and was designed to limit penalties enacted in either civil or criminal cases to punish and deter. Browning-Ferris Industries v. Kelco Disposal, Inc., 492 U.S. at 298.

collateral consequences of facilitating drug traffic, such as drug addiction, increased drug related violence, and the government's enforcement costs. All these are ills the drug laws were designed to address. [Citations omitted.]

While the entire magnitude of the national drug problem cannot be laid at the feet of any one drug offender, cf. United States v. A Parcel of Land With a Building Located Thereon, 884 F.2d 41, 44 (1st Cir. 1989), the government is entitled to compensation because of the injury inflicted by [the criminal] conduct. The Supreme Court has recognized that assessing damages is not an exact pursuit, and involves an element of "rough justice." Halper, [490 U.S. 435] 109 S.Ct. at 1902.

United States v. Certain Real Property and Premises Known as 38 Whalers Cove Drive, 747 F.Supp. 173, 180 (E.D.N.Y. 1990) aff'd, 954 F.2d 29 (2nd Cir.), cert. denied, 113 S.Ct. 55 (1992).

Justice Scalia in Harmelin v. Michigan, 111 S.Ct. at 2693, n. 9, and Justice Blackmun in Browning-Ferris Industries v. Kelco Disposal, Inc., 492 U.S. at 275-276, n. 21, raised the question whether the eighth amendment prohibition applies to monetary penalties which are awarded to, or shared with, the government. The question presents itself whether forfeitures in which funds are raised for the government are monetary penalties in the same sense that fines are monetary penalties. An instrumentality forfeiture, however, is affected to remove the harmful instrumentality regardless of whether it will result in revenue to the government. A crack house will be forfeited because it presents a danger to the public, even though its forfeiture results in a net loss to the government. A specially modified vehicle, airplane or boat is forfeited so it

can no longer be used to transport drugs, even if those modifications lessen or eliminate the value of the conveyance.

In rem instrumentality forfeiture is a remedial sanction to protect the public from harm, not to raise revenue. Forfeiture pursuant to 21 U.S.C. § 881(a)(7) has been recognized as forfeiture designed to inhibit the operation of narcotics dealers, and not a land acquisition program. United States v. One Single Family Residence, 699 F.Supp. 1531, 1536 (S.D. Fla. 1988).

To the extent revenue is generated,[20] it is appropriate to compensate the government for its expenses in the enforcement of drug laws and for its broader social expenses incurred as a result of the criminal conduct involved.[21]

The exclusion of civil instrumentality forfeiture from the scope of the eighth amendment "excessive fines" prohibition is consistent with the history and spirit of the eighth amendment. In rem forfeitures existed and were used prior to the adoption of the Constitution. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. at 680-683. The First Congress provided for in

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20. *Some, including many law enforcement advocates of forfeiture, claim the government derives substantial revenue from instrumentality forfeitures. This is largely a myth. While "proceeds" forfeitures, which generally involve money, generate significant income, instrumentality forfeitures often do not result in revenue to the State. State forfeiture experience varies from state to state, but property handling costs are roughly comparable to the experience of the U.S. Customs Service.*

In the 1989 testimony of Government Accounting Office (GAO) before Congress, the GAO reported that on gross seizures with a total appraised value of $438.9 million in FYs 88 and 89, after remissions, expenses, etc., the U.S. Customs Service netted $9.8 million, including an allowance of $9.7 million for the value of property placed into law enforcement service. This is a return of just over two cents per dollar seized. Statement of Richard L. Fogel, before Subcommittee on Oversight of the Committee on Ways and Means, U.S. House of Representatives, Table 1 and pp. 6-9.

21. *Federally forfeited funds are used for law enforcement purposes. Federal funds shared to state and local governments are also used for law enforcement purposes, including treatment. Many state laws provide that forfeiture funds are to be used for law enforcement purposes. For example, in Arizona and California, forfeited funds are used for law enforcement purposes as well as drug treatment and gang prevention. See, Ariz.Rev.Stats., § 13-2314.01; Cal. Health & Saf. Code, § 11489.*

rem forfeitures involved in customs offenses. Id., at 683. The forfeitures enacted in those early years included forfeitures of ships, the most valuable personal property of the era. The same Congress drafted the Bill of Rights and was fully aware of such forfeiture authority. The Constitution specifically outlawed forfeiture of estate except for treason in Article III, Section 3. The failure of the drafters of the Bill of Rights to prohibit "excessive fines and forfeitures" leads to the logical conclusion that the eighth amendment was not intended to apply to civil instrumentality forfeitures. As civil instrumentality forfeiture is distinctly remedial, wholly apart from a criminal proceeding, it does not constitute a fine subject to the eighth amendment prohibitions.

III. CIVIL INSTRUMENTALITY FORFEITURE IS CONSTRAINED ONLY BY ITS RATIONAL RELATIONSHIP TO THE PURPOSES OF REGULATING, SUPPRESSING AND REMEDYING ILLEGAL CONDUCT

Although civil instrumentality forfeiture is not subject to the prohibitions of the eighth amendment, there is a meaningful limit on the scope of civil forfeiture. Amici suggest that the court has fashioned a reasonable constraint. In Calero-Toledo v. Pearson Yacht Leasing Co., this Court recognized that there was a limit on civil forfeiture when the "rationality" of the forfeiture could not be sustained; in that instance, when the illegal use of the property is in spite of all reasonable efforts by the owner to prevent the proscribed use of the property. 416 U.S. at 689, citing Peisch v. Ware, 4 U.S. (Cranch) 347, 363 (1808). Although not raised directly in the petition, this is an appropriate point at which to fix the "outer limits,"

Browning-Ferris Industries v. Kelco Disposal, Inc., 492 U.S. at 276, of civil instrumentality forfeiture.

In order to determine the "rationality" of a statutory forfeiture scheme, a two-part inquiry is appropriate. First, what is the nature of the prohibited or regulated conduct which the forfeiture seeks to address and remedy? Second, what purposes or effects are served by the forfeiture in light of the nature of the underlying activity? This inquiry, which examines the nature of the prohibited activity and purposes to be served by the forfeiture, is wholly consistent with this Court's recognition that throughout history, civil instrumentality forfeiture has evolved to meet the challenges of illegal or anti-social conduct. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. at 681, n. 19.[22]

The economic power (estimated revenues are $150 billion annually) and resilience of the illicit drug industry is based partly on its organizational structure. An understanding of the organizational structure of the drug trafficking business leads naturally to strategies of control that are remedial and entirely unrelated to the punishment of the individual participants, and demonstrates the special rationale of instrumentality forfeiture.

Drug trafficking is structured as a network. It is characterized by an absence of a formal corporate or military style of organization. Network organization is common in legitimate industries, wherever it maximizes the ability of individual businesses to financially succeed. A network grows up spontaneously to link those who are available to perform each of the various activities that must be done in order to accomplish the overall functions of the industry.

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22. *The need for a remedial, economic approach is evident from the economic nature of our core goals. Forfeiture, a remedy used to mold the economics of the Original Colonies under the Navigation Acts, to discourage the slave trade, to disempower the Confederacy and to combat illegal alcohol, Calero-Toledo v. Pearson Yacht Leasing Co., supra, 416 U.S. at 683, has been brought to bear on the narcotics networks. Its unique qualifications to assist in the economic control of the illegal drug industry are at the heart of its rational basis and practical success.*

Cocaine trafficking requires production, processing, transportation, distribution, and money laundering. Other cocaine industry participants work closely with people carrying on criminal activities necessary to generate the money needed by purchasers, such as fencing and property crimes.

The cocaine industry also generates support service businesses. They include financial and legal advisers, corruptors, specialized money launderers, and most significantly, providers of necessary property and materials.

The entire industry is made up of individual participants, each operating at some level of dominance in whatever functional component or components of the industry they select, taking their profits on an individual basis from each venture they engage in. The essential property and money that must be used to make each necessary act occur, from production through consumption, is provided in diffused fashion by each participant according to their own needs. Thousands of miles and dozens of transactions separate the cocoa leaf farmer in the Peruvian foothills from petitioner on the plains of South Dakota, but both are part of a huge network maintained to bring cocaine to the ultimate user. In fact, petitioner, as the retailer, is indispensable to the network and the proximate cause of the billions of dollars social costs resulting from the use of illegal drugs.

Because property is the power supporting this network, removal of this essential property is the objective of forfeiture, completely apart from and not connected to punishment of offenders. The economic effect of forfeiture addresses the mathematics of illegal industries. To operate the $150 billion/year gross retail illegal United States drug industry, thousands of participants use hundreds of billions of dollars in property, contributed through a vast network. The government, federal, state and local, seizes between $1 and $2 billion per year, most of it "proceeds" or profits, not instrumentalities, so the risk of seizure of a particular asset for facilitating a drug offense is a fraction of 1%. Assets that are used to facilitate crime are generally used more than once. The risk of loss of

property associated with any single use of a particular asset is therefore some fraction of 1%.

Forfeiture is uniquely suited to make the most of its limited economic impact compared to the total size of the industry it addresses. Unlike a tax or a mandated expense, forfeiture is not easily planned for. Its unpredictable occurrence may fall upon any network asset at any time, so it has disruptive potential far beyond the dollar value of its interference.

The avowed purposes of the anti-narcotics forfeiture statutes have been identified as interfering with criminal activity by removing the instrumentality from the offender and from the network of which their activity is a part; removing the incentive to engage in illegal activity by imposing economic sanctions on criminal conduct and on supporting activities; securing enforcement of regulatory and revenue statutes; imposing a duty of care on those whose property might be used as an instrumentality of a crime; and financing government efforts designed to prevent, eliminate and pay the costs of criminal activity. See Caplin & Drysdale v. United States, 491 U.S. at 630; Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. at 687-688; United States v. Santoro, 866 F.2d at 1544; United States v. D.K.G. Appaloosas, Inc., 829 F.2d 532, 544 (5th Cir. 1987).

Civil instrumentality forfeiture serves the remedial purposes of the forfeiture statutes precisely. It interferes with the criminal activity by removing the very objects which are used to facilitate and continue the criminal act. Indeed, the civil remedy is perfectly tailored to its overriding purpose - the removal of the economic assets employed in trafficking activity. Additionally, instrumentality forfeiture works to enforce a duty of care on property owners by placing at appropriately limited risk property which is used for criminal purposes.

Thus, civil instrumentality forfeiture, particularly as embodied in § 881 of Title 21, sustains its "rationality" in light of the highly capitalized, network structure of the illicit drug industry to which it is addressed and the identified purposes or

goals set out for such forfeitures. Certainly, as drafted and as generally applied, forfeiture under § 881 bears a rational relationship to the goals and purposes of regulating, suppressing and remedying the illegal trade in narcotics.

In opposition to the obviously rational relationship between civil instrumentality forfeiture and the remedial goals and effects of the forfeiture statutes, Petitioner argues that instrumentality forfeiture can be disproportionate or irrational. The argument proceeds: The amount of loss visited on the property owner may have no relationship to the seriousness of the particular underlying offense, the extent of harm caused by that particular act, or the property owner's culpability or degree of involvement in the specific offense. Brief for Petitioner, at 43, 46-47. Such reasoning must necessarily fail. As the Ninth Circuit observed: "In [civil] forfeitures there is no necessary relation between the value of the property forfeited and the loss to the government, nor is there any necessary proportion between the value of the property forfeited and the criminal use of the property." United States v. McCaslin, 959 F.2d at 788.

Or as otherwise stated: "The value of the property is not inevitably related to the harmfulness of the use to which it is put." United States v. Certain Real Property and Premises Known as 38 Whalers Cove Drive, 747 F.Supp. at 181; see also, United States v. 141st Street Corporation, 911 F.2d at 881.

As previously discussed, the absence of a relationship between the value of the asset and the harm of the offending act is not irrational. To the contrary, it properly comprehends the calculated risk of loss versus expected gain from each illegal use of the property.

The Ninth Circuit has provided a suitable example:

> *Jaffee chose to conduct his small farming operations on his own land which was subject to the risk of forfeiture. Some of his colleagues in the same business planted their crops on land*

> *already owned by the United States and managed somewhat randomly by various federal agencies. These growers faced the constant risk of losing their crop, but not that of losing their land.*

United States v. Tax Lot 1500, TP., 861 F.2d 232, 235 (9th Cir. 1988).

The effort to test "proportionality" based on balancing the seriousness of the particular offense, the extent of harm caused by it or the culpability of the offender-owner against the value of the property forfeited is pointless and doomed to failure. See, e.g., United States v. Pryba, 900 F.2d 748, 757 (4th Cir. 1990), cert. denied, 111 S.Ct. 305 (1991). The calculation cannot realistically be made. Petitioner's further suggestion to factor the owner's financial condition, the nature of the property (as a residence), the "degree" of the involvement of the property in the offense, the severity of the crime and criminal punishment and the government's costs, Brief for Petitioner, at 47, is irrational. Most of these factors have no relation to the remedial purpose of the forfeiture statutes. These factors would be appropriate only if forfeiture is punishment, which it is not. Indeed, consideration of these factors would turn civil instrumentality forfeiture on its head and drain it of all purpose.

Considerations of monetary value, financial condition, or protected interests in the property itself are irrelevant considerations to the rationality of the forfeiture. Referring to the deodand concept, if used in a murder, the prince's Excalibur is every bit as subject to forfeiture as the plowman's knife. Or, as the Fourth Circuit recently observed, "The Ferrari is at least as harmful an instrumentality as the Chevette." United States v. Cullen, 979 F.2d at 995. The nature of the offending object, in terms of its place in our hierarchy of property values, is equally irrelevant. It does not

matter that, for example, the drug dealer chooses to store his contraband in a rented warehouse or his family residence.

Further, it is impossible to calculate the "seriousness" of a drug sales offense or the "extent of harm caused" by such an offense in purely monetary terms, which is, at bottom, what Petitioner's argument is all about. As one court observed: "That harm consists not only of the illicit profits from the actual drug sale, but the severe collateral consequences of facilitating drug traffic, such as drug addiction, increased drug related violence, and the government's enforcement costs. All these are ills the drug laws were designed to address. [Citations omitted.]" United States v. Certain Real Property and Premises Known as 38 Whalers Cove Drive, *747 F.Supp. at 180; see also,* United States v. 141st Street Corporation, *911 F.2d at 881.*

As applied in this case, the forfeiture of the trailer and body shop used by Petitioner to facilitate his distribution of cocaine is a rational response to the illicit use of the property without regard to any factors suggested as relating to "proportionality." The forfeiture precisely served the purposes of this remedial statute to remove the objects from the drug network, impose a disincentive, and compensate the government for its loss. The forfeiture here was rational and, therefore, proper.

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CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Court should uphold the long-held position that the eighth amendment does not constrain civil instrumentality forfeiture. Further, amici suggest that the Court's jurisprudence traceable through the Calero-Toledo *decision would sustain a civil forfeiture which is rationally related to the purposes of regulating, suppressing and remedying illegal conduct.*

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UNITED STATES OF AMERICA,

Respondent.

I, THE UNDERSIGNED, say: I am a citizen of the United States, am 18 years of age or over, employed in the County of San Diego in which County the below stated mailing occurred, and not a party to the subject cause, my business address being 110 West A Street, Suite 700; P.O. Box 85266, San Diego, California 92186-5266.

I have served the within BRIEF OF AMICI CURIAE STATES OF ARIZONA AND CALIFORNIA, IN SUPPORT OF RESPONDENT as follows:

To William K. Suter, Clerk, Supreme Court of the United States, Washington, D.C. 20543, an original and forty (40) copies, of which a true and correct copy of the document filed in this cause is hereunto affixed; AND, by placing four copies in a separate envelope addressed for and to each addressee named as follows:

Solicitor General
Department of Justice
Washington, D.C. 20530

Richard L. Johnson, Esq.
101 South Main Avenue, Suite 305
Sioux Falls, South Dakota 57102

Scott N. Peters, Esq.
300 North Dakota Avenue, Suite 510
Sioux Falls, South Dakota 57102

Each envelope was then sealed and with the postage prepaid deposited in the United States mail by me at San Diego, California, on the 29th day of March, 1993.

There is a delivery service by United States mail at each place so addressed or regular communication by United States between the place of mailing and each place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Dated at San Diego, California, March 29, 1993.

Lidia Hernández
LIDIA HERNANDEZ

Subscribed and sworn to before me this 29th day of March, 1993.

Anne Marie Buford
Notary Public in and for said County and State

ANNE MARIE BUFORD
Notary Public—California
County of San Diego
My Commission Expires 11/19/93